

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 11225 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE R.BALIA.

=====

1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES
2. To be referred to the Reporter or not? : YES
3. Whether Their Lordships wish to see the fair copy of the judgement? : NO
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO
5. Whether it is to be circulated to the Civil Judge? : NO

MALAY BABULAL SHAH

Versus

STATE OF GUJARAT

Appearance:

MR JA ADESHRA for Petitioner

NOTICE SERVED BY DS for Respondent No. 1, 2

CORAM : MR.JUSTICE R.BALIA.

Date of decision: 28/10/1999

ORAL JUDGEMENT

#. The petitioner challenges his supersession by his juniors in pursuance of the recommendations made by the Departmental Promotion Committee (for short, 'the DPC') which met on 15.12.1997 for considering the case of persons eligible for promotion to the post of Executive Engineer (Civil). The petitioner was appointed as Junior

Engineer, now designated as Assistant Engineer, through GPSC on 16.1.1979 and was initially posted at Capital Project Circle, Gandhinagar. After his appointment petitioner passed the requisite competitive examination for direct recruitment of Class I and Class II officers and in July 1980 petitioner was selected for class II post of Dy. Executive Engineer (Civil) and was appointed and posted as such at Godhra in Irrigation Department. The petitioner worked at various places under Panam Irrigation Project during the period from 1.8.82 to 25.9.84 after being transferred from Panam Project. From September 1994 petitioner was transferred to Narmada Water Resources and Water Supply Department, Gandhinagar, as Deputy Executive Engineer and until the filing of the petition the petitioner was working there. According to the seniority list of Deputy Executive Engineer (Civil) published by State Government on 27.3.1995 the name of the petitioner finds place at Sr.No. 220. In pursuance of the aforesaid recommendation made by the Departmental Promotion Committee persons below in the list have been promoted as Executive Engineer (Civil). The petitioner challenges his supersession on the ground of violation of Article 14 and 16 and contends that while promoting persons junior to him without there being any material on basis of which respondents could act to his detriment in the matter of promotion and not considering the petitioner for promotion while granting promotion to the juniors amounts hostile discrimination against the petitioner violating Articles 14 and 16 of the Constitution of India. The petitioner pointed out in this petition that after the Departmental Promotion Committee met in December 1997, petitioner was served with charge sheet dated 7.1.1998 in respect of alleged acts and omission committed while the petitioner was working at Capital Project Division in 1984. According to the charge sheet the period of alleged incident is spread over between 30.1.1984 to 8.4.1995. It is further contended that initiation of departmental enquiry subsequent to holding of meeting by Departmental Promotion Committee could not permit recourse to sealed cover procedure on the ground of alleged decision to initiate an enquiry against the petitioner in respect of alleged charges. The petitioner relies on a decision of this Court in Special Civil Application NO. 744 of 1998 Valimad Pirbhai Sanesra v. State of Gujarat and another decided on 7.7.1998 in which identical circumstances the adoption of sealed cover process by the very same Departmental Promotion Committee had met on 15.12.1997 for considering the case of persons eligible for promotion to the post of Executive Engineer (Civil) to which petitioner is also a candidate has held against the

adoption of sealed cover procedure in the circumstances stated above. Petitioner's case is squarely governed by the decision in Special Civil Application No. 744 of 1998. It is further stated by learned counsel for the petitioner that Letters Patent Appeal No. 1354 of 1998 the aforesaid decision has also been since been dismissed.

#. It has also been urged by learned counsel for the petitioner that institution of enquiry by serving charge sheet on 7.1.1998, in respect of acts that has taken place between 30.11.1984 and 8.4.1985, is highly belated and deserves to be quashed on the principle enunciated by Supreme Court in State of Madhya Pradesh v. Bani Singh AIR 1990 SC 1308 and State of Andhra Pradesh v. N. Radhakishan AIR 1998 SC 1833.

#. Learned counsel for the respondent has candidly urged that so far as the stage upto consideration of the petitioner by the DPC and adoption of sealed cover procedure is concerned there is no distinction between the case of the petitioner and the case of Mr. Sonesra, petitioner in SCA 744/98 decided on 7.7.98 and the adoption of the sealed covered procedure in the case of the petitioner when his case was considered by DPC cannot be defended. However, it was further urged by learned counsel that merely because the sealed cover procedure has been adopted in the case of the petitioner wrongly he does not become entitled to ipso facto for mandamus to promotion on the next higher post without considering the fact situation as it really exists on the date when promotion is actually to be accorded. It was urged by learned counsel that even in case where sealed cover procedure is not adopted and a person is included in select list recommended by the DPC, if before the date of considering actual promotion an incumbent is subjected to departmental enquiry he cannot be promoted notwithstanding his name being in the select list. For this purpose reliance was placed on clause (7) of the Government Resolution dated 23.9.81 which provides that where name of an incumbent is included in the select list but he is subsequently placed under suspension against whom criminal proceedings/departmental proceedings have been initiated cannot be promoted on the basis of his inclusion in the select list until he is completely exonerated of the charges against him. If the Government servant is completely exonerated of the charges he is to be promoted on the basis of position in the select list to the post which may have been filled on temporary basis pending disposal of the enquiry against him. If the exoneration is not complete the question of his promotion

will have to be examined afresh. As enquiry against the petitioner has been instituted on 7.1.1998 with the furnishing of charge sheet and by that time the promotional exercise has not taken place petitioner could not have been promoted, even if his name is taken to be included in the select list recommended by the DPC. The case of petitioner cannot be higher than that. It was also urged by learned counsel for the petitioner that according to another decision of the Government contained in Resolution No. GAD No. SLT-1080/896/G-2 dated 2nd April 1993 the Government is required to consider the case of an incumbent for promotion on the basis of select list after two years of the initiation of such enquiry sheet if by the time the proceedings are not complete and consider whether to afford him promotion on the basis of inclusion in select list or not. However, that exercise falls within the sphere of discretion of the Government. As two years from the date of institution of charge sheet shall expire only in January 2000 petitioner's case for offering promotion on the basis of recommendation made by the DPC, and the committee in this connection shall be meeting on 15.12.1999, petitioner's shall be considered on the basis of recommendation made in the sealed cover by the DPC, on that date. Apart from this it was pointed out that after the initiation of enquiry in connection with acts and omissions pertaining to period 1984-85 petitioner has been served with another charge sheet dated 1.4.1999 which pertains to further irregularities committed by him between the financial year 1991-92 and a third charge sheet is also in the offing in connection with other irregularities in respect of which a preliminary enquiry is at the stage of finalisation.

#. So far as the facts of the present case are concerned it is not in dispute that no charge sheet was served on the petitioner prior to 7.1.1998 and in that sense it can be said without fear of contradiction that as on the date the DPC met on 15.12.1997 no enquiry was pending against the petitioner on the basis of which the DPC could withhold the consideration of petitioner for promotion or could adopt sealed cover procedure to withhold action on the recommendation made in respect of the petitioner. The fact that a conscious decision has been taken to initiate departmental proceedings is not sufficient to adopt sealed cover procedure for stopping the wheels of consideration for promotion on the basis of recommendation is well established by a chain of decisions. Reference in this connection is made to *Union of India v. K.V. Janakiraman* AIR 1991 SC 2010 and *State of Madhya Pradesh and Another v. Syed Naseem Zahir* (1993) Supp 2 SCC 225 as followed by this court in SCA

744 of 1998 decided on 7.7.1998 which according to learned counsel for the parties has since been affirmed by the Division Bench in Letters Patent Appeal. Therefore to the extent the DPC has adopted sealed cover procedure for placing its recommendation it must be held to be bad in law. The recommendations made by the DPC must be made known for the purpose of taking subsequent action by the appropriate authority on that basis.

#. However, it is not possible to accede to the contention raised by learned counsel for the petitioner that ipso facto on removing the procedure of sealed cover in the case of petitioner the respondents are under an obligation to offer an appointment by promotion to the petitioner on higher post on the basis of recommendation contained in the sealed cover. His position in that circumstance cannot be better than a person whose name has been initially included in the select list but who has been later on subjected to a departmental enquiry or to a criminal proceeding.

#. It may be pertinent to notice here the decision of the Supreme court in Syed Naseem Zahir (supra). It was a case in which the sealed cover procedure was adopted in the case of the incumbent before charge sheet was served on him. However, at the time when the DPC met, the departmental proceedings was contemplated against the incumbent. Because of that contemplated action recommendation of the DPC to recommend him were kept in sealed cover. The incumbent has challenged the adoption of sealed cover procedure and consequent non promotion by way of writ petition before M.P. High Court which stood transferred to M.P. Administrative Tribunal on its constitution. The Tribunal following the decision of the Supreme Court in Union of India v. Jankiraman (supra) came to the conclusion that sealed cover procedure can be adopted only after the date of issue of charge sheet that being the date from which departmental proceedings can be taken to be initiated. Consequent to this conclusion, the Tribunal further directed to promote the incumbent to the post of Chief Engineer for which his name was included in the select list. The Supreme Court while concluding that the decision of the Tribunal as to indicting sealed cover procedure was unexceptionable on the question of direction for promotion, observed:

"It is difficult to ignore the glaring facts in a case and act mechanically."

#. In coming to this conclusion it relied on the following observations made in Jankiraman's Case (supra)

wherein also the court after finding the adoption of sealed cover procedure to be bad had found the Tribunal not justified in mechanically directing and showering benefit of promotion including payment of arrears of salary:

"In view of the aforesaid peculiar facts of the present case, the DPC which met in July 1986 was justified in resorting to the sealed cover procedure, notwithstanding the fact that the charge-sheet in the departmental proceedings was issued in August/December, 1987. The Tribunal was, therefore, not justified in mechanically applying the decision of the Full Bench to the facts of the present case and also in directing all benefits to be given to the employees including payment of arrears of salary."

#. These two decisions of the Supreme Court do make it abundantly clear that notwithstanding that DPC may not be justified in adopting the sealed cover procedure in case departmental proceedings have not been initiated by serving charge sheet on the delinquent officer, as on the date it deliberates yet as a result of this conclusion alone, direction for giving effect to the recommendations of the DPC in sealed cover cannot be issued mechanically without evaluating the facts and circumstances in each case in which subsequent to the recommendation of DPC a proper enquiry or criminal case has come to be instituted against the delinquent awaiting promotion. The promotional exercise has to be viewed in that light as on the date when actual promotions take place. It is perhaps to offer a guideline to this end to keep a check and balance on withholding of promotions indefinitely that the State Government had included clause (7) in its resolution dated 23.9.81 and has also adopted procedure of periodical review of such cases where though a person's name has been included in the select list recommended by the DPC yet could not be promoted due to subsequent institution of incriminating proceedings for the purpose of giving effect to such recommendations even during the pendency of proceedings.

#. The question of compatibility of issuing such directions where promotion had not been afforded to a person inspite of his inclusion in the select list by the DPC directly arose before this Court in LPA No. 369/93 decided on 28.9.1993, arising out SCA 2495/93. That was a case in which the petitioner was in the cadre of Executive Engineer and was denied promotion to the post of Superintending Engineer on the ground that the

disciplinary proceedings have been initiated against him despite his name was included in the select list. The DPC which met on 26.5.92 included the name of petitioner in select list, which select list was approved by the Government on 30.8.92 and also received approval of the GPSC on 24.5.93. The select list was operated upon on 21.7.93, in which three government servants including petitioner were not given promotion inasmuch as before this exercise took place on 2.2.93 a charge sheet was framed and issued to the petitioner and was served on him on 4.2.93. The facts clearly disclose that the petitioner was considered by DPC at a time when no enquiry was pending against him and his name was in fact included in the select list which was approved by all authorities including GPSC. However after this exercise has taken place but before actual promotions took place petitioner was already served with charge sheet on 4.2.93. Petitioner failed before the learned. Single Judge. The respondents in the case relied on clause (7) of the resolution dated 23.9.81 referred to above to sustain its action in denying promotion to the petitioner. Clause (7) read as under:-

"A Government servant whose name is included in the select list but who is subsequently placed under suspension or against whom criminal proceedings/departmental proceedings have been initiated should not be promoted on the basis of his inclusion in the Select List until he is completely exonerated of the charges against him. If the Government servant is completely exonerated of the charges, he will be promoted on the basis of his position in the select list, to the post which has been filled on a temporary basis pending disposal of the charge against him. If the exoneration is not complete, the question of his suitability for promotion will have to be adjusted afresh as mentioned in para 5 above."

##. The court found the case of the petitioner within the purview of clause (7) of Government Resolution of 1981 and the petitioner was denied the promotion. The court held the premise that the powers be it under the rules of administrative or executive instructions, have to be exercised fairly and reasonably and not arbitrarily, capriciously and unreasonably, and that the executive acts in good faith having regard to all relevant considerations and not swayed by irrelevant consideration and must not seek to promote purposes alien to the letter or to the spirit of the rule that confers the power to act, and examined the facts of the cases.

It found the denial of promotion to the petitioners at that stage justified, and refused to issue mandamus for affording promotion to the petitioner as a result of recommendations made by DPC and approved by GPSC, merely on the basis of select list having been made at a point of time when no charge sheet was pending without taking into consideration the existing fact realities affecting the consideration for promotion to the higher post on the date of promotion. The court took into consideration the totality of circumstances which led to initiation of enquiry against the petitioner, proximity of time which the respondents took in framing charges against the petitioner after it was informed about the alleged acts and omissions amounting to misconduct of the petitioner and time taken for conducting the enquiry after the same had been initiated and issue appropriate direction for future. In the process court also referred to chronology of events which led to initiation of departmental enquiry against the petitioner. Finding that the application was received by the Government for the first time in 1987 requesting probe into allegations of corruption and favouritism in the service of Gujarat Engineering Research Institute in which petitioner was serving at the relevant point of time and after undergoing normal procedure for preliminary enquiry and seeking approvals at different stages as per the rules of business including seeking opinion of independent authority, Vigilance Commissioner and obtaining sanctions at different levels of administrative hierarchy which culminated in issuance of charge sheet after about six years of the first receipt of information in February 1993 found that the initiation of enquiry was not unduly delayed so as to warrant its ignoring and to be infructuous for the purpose of being considered for promotional exercise in the case of petitioner.

##. Viewed in that light of aforesaid scenario, if the facts of the present case are examined the case is nearer the ratio adopted by Division Bench of this Court. Respondents have detailed in their reply that so far as first enquiry which was instituted by issuing charge sheet on 7.1.1998, the first information about the irregularities in the Sipu Silt Channel works was received on 27.3.92 which was sent on 28.4.92 to the Government in Narmada Water and Resources Department, for holding an enquiry into the matter and requisitioning enquiry report from the Government. On receipt of letter from the independent authority in April 1992 the Government entrusted the preliminary enquiry to Chief Engineer (Quality Control) on 1.6.92 whose report was made available to the Government on 24.8.93, in which

over a long period of functioning on site, in all 16 persons were found involved for various irregularities of which two had already retired. After scrutinising the cases, the Government asked for explanation from 14 officers on 16.2.1994 which were responded to by all the officers, excluding the two retired persons to whom notices were not issued by the end of June 1994. Soon after receipt of all explanations and preliminary enquiry, reports were sent to independent authority on 17.12.1994 whose recommendations were received by the Government on 13.3.1996. After scrutinising the report of the independent authority the Government decided to accept the recommendations on 9.5.1996 and decided to constitute departmental enquiry against above 13 officers for which it appointed two retired Section Officers for framing charge sheet inasmuch as a number of departmental enquiries on variable charges spreading over a long period of record were to be framed. After receiving the frame work of charge sheets those entrusted to frame charge sheet and securing approval of the competent authorities at different level the charge sheets on 13 delinquents were issued on 7.1.98. According to the details furnished in reply the defence statements have been submitted by the petitioner only on 8th October 1998. Other persons have also submitted their defence statements on different dates, the latest being by the petitioner. After receipt of defence statement from all except two officers, the enquiry officer has been appointed on 28.1.1999. In these circumstances, I am of the opinion that institution of enquiry by itself cannot be said to be so delayed so as to warrant interference at this stage to quash the enquiry itself. The principle relied on by learned counsel for the petitioner in this regard as enunciated in N. Radhakishan's case (supra) 1998 SC 1854 and Bani Singh's case (AIR 1990 SC 1033) cannot be invoked successfully in the facts and circumstances of the present case. It may be noticed that in neither of the case, the Apex Court has laid down an absolute rule of limitation beyond which a departmental enquiry cannot be instituted swayed away from the date of alleged misconduct. In Bani Singh's case, a charge sheet was issued on 22.4.1987 in respect of certain incidents which happened in 1975-76 when said officer was posted as Commandant of 14th Battalion of SAF, Gwalior. Finding that according to the State authorities even in April 1977 there was a doubt about the involvement of the officer in the said incidents and investigations were going on since then and finding that there were no other circumstances which justified more than 12 years in instituting enquiry as evaluated by the Tribunal, the Court declined to interfere with the

conclusions reached by the Tribunal in quashing the enquiry on the contention raised by the State that Tribunal should not have quashed the proceedings merely on the ground of delay and laches and should have allowed the enquiry to go to set aside the matter on merits. The case turned on facts of its own and the fact that inordinate delay took place, without any explanation in instituting enquiry more than 12 years after the State has the knowledge about alleged acts of misconduct.

##. In Radhakishan's case (supra) the court made it more than clear that question of vitiating any departmental enquiry on the ground of delay in its initiation depends on facts of each case and not on any straight jacket formula. It said in no uncertain terms:

"It is not possible to lay down any predetermined principles applicable to all cases and in all situations where there is delay in concluding the disciplinary proceedings. Whether on that ground the disciplinary proceedings are to be terminated each case has to be examined on the facts and circumstances in that case. The essence of the matter is that the Court has to take into consideration all relevant factors and to balance and weigh them to determine if it is in the interest of clean and honest administration that the disciplinary proceedings should be allowed to terminate after delay particularly when delay is abnormal and there is no explanation for the delay. The delinquent employee has a right that disciplinary proceedings against him are concluded expeditiously and he is not made to undergo mental agony and also monetary loss when these are unnecessarily prolonged without any fault on his part in delaying the proceedings. In considering whether delay has vitiated the disciplinary proceedings the Court has to consider the nature of charge, its complexity and on what account the delay has occurred. If the delay is unexplained prejudice to the delinquent employee is writ large on the face of it. It could also be seen as to how much disciplinary authority is serious in pursuing the charges against its employee. It is the basic principle of administrative justice that an officer entrusted with a particular job has to perform his duties honestly, efficiently and in accordance with the rules. If he deviates from this path he is to suffer a penalty prescribed. Normally, disciplinary proceedings should be

allowed to take its course as per relevant rules but then delay defeats justice. Delay causes prejudice to the charged officer unless it can be shown that he is to blame for the delay or when there is proper explanation for the delay in conducting the disciplinary proceedings. Ultimately, the Court is to balance these two diverse considerations."

##. Therefore on the petitioner's own showing I am unable to accede to the contention that merely because there is long time gap between the alleged dates of misconducts attributed to the petitioner and the date of initiation of charge sheet. The case has to be examined not only from the point of view whether the petitioner was at fault for this delay in initiation of proceedings or further culmination of proceedings but whether there is any culpable delay on the part of the competent authority as a whole, so as to sacrifice the desirability of continuance of a departmental enquiry and to bring it to its conclusion on merit. That is the normal rule as stated by the Supreme Court in Radhakishan's case. In Delhi Development Authority v. H.C. Khurana AIR 1993 SC 1488 the court observed:

"Where a decision has been taken to initiate the disciplinary proceedings against the Government servant his promotion even if he is found otherwise suitable, would be incongruous, because a Government servant under such a cloud should not be promoted till he is cleared of the allegations against him, into which an inquiry has to be made according to the decision taken. In such a situation, the correctness of the allegation being dependent on the final outcome of the disciplinary proceedings, it would not be fair to exclude him from consideration for promotion till conclusion of the disciplinary proceedings, even though it would be improper to promote him, if found otherwise suitable, unless exonerated."

##. Relying on the aforesaid proposition the Division Bench of this Court in LPA 369/93 observed:

"Paragraph 7 of the Government Resolution seems to have provided for the contingency of keeping away, those Government Servants who have actually come within the mischief of facing prosecution of disciplinary proceedings after the issuance of charge memorandum. In the present case as

already noted there are no allegations of mala fides. The only factor which we are asked to note of is the alleged inordinate delay on both the courts to say that the action is arbitrary and unreasonable. We have found that there has not been any inordinate delay either with reference to the initiation of the departmental proceedings or the effectuation of the select list settled by the Departmental Promotion Committee and the processes that are required to be taken legitimately alone have been gone through and hence they have to stand and need not be frowned upon"

##. Thus the Division Bench not only upheld the reasonableness and the plausibility of application of clause (7) in the case like the present one but found in the absence of any charges of malafide the time which has taken in completing formalities before charge sheet could actually be issued at different echelons of decision making process, as reasonable explanation for delays in taking decisions, for holding departmental enquiry against the delinquent in the cases like the present one. The decision in the present case is no different as is emanating from facts noticed above. No charges of malafide has been levelled in the petition against any of the officers of the State for deliberately delaying the decision making process of the State at any level to the detriment of the petitioner. The State Government has explained that since it received the information about the alleged irregularities in 1992 it has promptly acted in initiating the process necessary for deciding whether to initiate departmental proceedings or not by way of directing to hold a preliminary enquiry for scrutinising the material that has come before it seeking opinion of the Vigilance Commissioner and asking for the report from independent authority and thereafter for taking the services of expert in framing of the charges before the same could be served on the petitioner.

##. There cannot be any straight jacket frame work for taking decision without a preliminary enquiry for assimilating facts concerning a large number of people in respect of acts spread over a long period and the charges are of institutional irregularities and illegalities in the matter of observing the financial discipline in the management of affairs of the State. I am therefore not inclined to accept the contention of the learned counsel for the petitioner that in the facts and circumstances, the time taken by the respondents is of such enormous expanse so as to warrant to nip the enquiry in the bud at

this juncture and not allow it to continue to reach its logical conclusion. It is further pertinent to notice that after service of charge sheet in January 1998 petitioner has submitted his statement of defence only in October 1998 and within three months of submission of last statement of defence by him, out of 11 such defences received by the State, enquiry officer has been appointed in January 1999. Coupled with these circumstances the assurance given by the respondent in their reply affidavit and through their counsel before this court that the case of the petitioner for promotion on the basis of recommendation made by DPC shall be reviewed in the forthcoming meeting of the Committee in December 1999, there is no reason at this juncture to scuttle the enquiry and direct the respondents to act on the select list without awaiting completion of enquiry on merit.

##. Lastly it was urged by Mr. Adeshsra to safeguard the petitioner against inordinate delay if any that may be caused in conclusion of the enquiry. The request appears to be reasonable. Respondents shall conclude the pending enquiries against the petitioner, namely, enquiries which have been initiated by serving charge sheets on 7.1.98 and 1.4.99 within a period of one year, i.e., on or before 31.10.2000. The third enquiry which is contemplated as per reply against the petitioner if not already instituted, decision to institute or not to institute such enquiry should be taken within a period of six weeks, failing which it shall be deemed that the respondents are not inclined to institute any third enquiry in respect of incidents referred to in the reply. In case such an enquiry is instituted within six weeks the same shall be completed along with other two enquiries. If for any reason the enquiries are not concluded by 31.10.2000, the petitioner shall be promoted on ad hoc basis on the basis of recommendation made by DPC convened on 15.12.1997 on adhoc basis subject to conclusion of enquiries. However, this is without prejudice to and will not come in the way of respondents for considering the petitioner for promotion in the Committee of 19.12.1997 according to procedure already adopted by the Government under the Resolution of 1993 referred to above.

Petition accordingly stands disposed off.

Rule discharged.

There shall be no order as to costs.

(Rajesh Balia,J)

